Case No. 49178-8-II

IN THE COURT OF APPEALS, DIVISION TWO OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Plaintiff/Respondent,

vs.

LENDIN SAITI,
Defendant/Appellant.

Appeal from the Superior Court of Pacific County

Superior Court Case No. 15-1-00228-5

APPELLANT'S BRIEF

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ASSIGNMENTS OF ERROR

1. There is insufficient evidence to support convictions in the following:
    a. The State failed to present sufficient evidence to prove beyond a reasonable doubt that the defendant knew there was a firearm in his girlfriend's purse.
    b. The State failed to present sufficient evidence to prove beyond a reasonable doubt that the defendant "intended to deprive" Ms. Lopez of her motor vehicle.
    c. The State failed to present sufficient evidence to prove beyond a reasonable doubt that the defendant used a position of trust to gain access to the motor vehicle.
    d. The State failed to present sufficient evidence to prove beyond a reasonable doubt that the defendant violated Ms. Lopez's privacy when gained access to the motor vehicle.
2. The trial court erred when it denied the defense the opportunity to cross examine the State's Witness regarding her motivation in testifying, thereby violating the Confrontation Clause.
3. The trial court erred in finding that the California crime of Grand Theft was comparalbe to First Degree Theft in Washington.
4. Under the facts of this case, RCW 69.50.412 and RCW 69.50.4013 are concurrent and the defendant was sentence twice for the same crime.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is the State required to prove beyond a reasonable that the defendant knew of the presence of a firearm in his girlfriends purse to sustain a conviction for Unlawful Possession of a Firearm?
    a. Is there sufficient evidence to find possession beyond a reasonable doubt when the only evidence was that defendant saw the firearm one time as it was put in a purse, weeks if not months before the charged event, but there was no evidence defendant saw, handled, or knew the firearm was in the purse on the day in question.
2. Is the State required to prove "intent to deprive" beyond a reasonable doubt to obtain a conviction for Theft of a Motor Vehicle?
    a. Is there sufficient evidence to find "intent to deprive" when a domestic partner only drive the other partner's car?

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3. Is there sufficient evidence to support aggravating circumstances where the defendant and victim lived together, but
   a. position of trust was not used to gain access to car keys.
   b. only evidence was that defendant took a purse from a chair in an unoccupied room.
4. Is the denial of a defendant's request to confront a witness regarding her material witness arrest the day before trial, deposition, and threat of criminal charges, as it related to the credibility of her testimony, an unconstitutional violation of the confrontation clause?
5. Are RCW 69.50.412 and RCW 69.50.4013 concurrent statutes when a container is deamed "drug paraphenalia" only because a drug is present?
   a. If so, does this prohibit convition under the general statute?

STATEMENT OF THE CASE

Lendin Saiti and Patty Lopez met online via Facebook through mutual friends. Verbatim Report of Proceedings (VRP) at 145. At the time, Mr. Saiti was living in California and was on parole with the State of California. VRP at 146, 168, 389. In July of 2015, Ms. Lopez invited Mr. Saiti to visit. They became romantically involved and began living together, along with Ms. Lopez's minor daughter in Ms. Lopez's apartment that was located above the restaurant where Ms. Lopez worked. VRP at 48, 107. When Mr. Saiti moved in with Ms. Lopez, she was aware of his prior conviction and that he had a heroin addiction. VRP at 148. From time to time, Ms. Lopez gave Mr. Saiti money to buy drugs. VRP at 115, 163. Mr. Saiti was unemployed, but he helped out around the house and treated Ms. Lopez and her daughter well. Mr. Saiti would regularly use

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Ms. Lopez's car for different purposes, including running errands, taking Ms. Lopez's daughter to school, and visiting friends. VRP at 149. Mr. Saiti occasionally paid for gas. VRP at 169. Sometime after Mr. Saiti moved in with Ms. Lopez, Ms. Lopez purchased a handgun. She reported that she took it out of the box and placed it in a large purse while Mr. Saiti was present. VRP at 77. Ms. Lopez owned a number of large Coach Purses, which allowed her to carry a large number of items in the purse. VRP at 156 - 159. Ms. Lopez owns at least ten Coach purses of this type, which she changed on a weekly basis. VRP at 151; 170. Ms. Lopez gave conflicting testimoney about whether the gun was always in her purse (VRP at 77, 152), However, she testified that except for the time she took the gun out of the box and placed it in the first purse, Mr. Saiti never saw the gun again and did not observe her move the gun from purse to purse VRP at 151.

On December 20, 2015, Mr. Saiti approached Ms. Lopez asked for money. However, Ms. Lopez declined and went to work. VRP at 53, 63. Ms. Lopez took her purse and had a large set of keys in one hand. VRP at 153 - 154. After opening the restaurant, Ms. Lopez placed her purse in the kitchen and placed the keys on top of the other items in the purse. VRP at 155 - 156. Later that afternoon, Mr. Saiti went to the restaurant below the apartment where Ms. Lopez was working. VRP at 45, 107, 171. Amy R.

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Leback, who works with Ms. Lopez, saw Mr. Saiti in the restaurant and recognized him as Ms. Lopez's boyfriend, so she notified Ms. Lopez that Mr. Saiti was there and returned to her office. VRP at 110. Ms. Lopez went out to speak with Mr. Saiti. Mr. Saiti renewed his request for money and also asked Ms. Lopez if he could use her phone. Ms. Lopez declined and Mr. Saiti left the restaurant, apparently upset. VRP at 66. Sometime thereafter, Ms. Lopez observed her car leaving the parking lot. She went to the kitchen and found her purse, which contained $80, car keys, the gun, and other items, was gone. VRP at 66. The purse had been left on a chair in the kitchen. VRP at 111. After discovering that her purse was gone, Ms. Lopez asked Ms. Leback to call the police. Ms. Leback had seen Mr. Saiti leaving with Ms. Lopez's purse and car. Although Ms. Leback thought it a little odd to see Mr. Saiti leaving with Ms. Lopez's purse, she took no action until Ms. Lopez asked her to call the police. VRP at 110 - 112. Ms. Leback had seen Mr. Saiti use Ms. Lopez's car on several occasions without Ms. Lopez. VRP at 115. In response to Ms. Leback's call, the police arrived at the restaurant and took statements. Ms. Leback "physically wrote" out Ms. Lopez's statement because Ms. Lopez "didn't feel comfortable writing out complete sentences." VRP at 113.

The police then began looking for Mr. Saiti. The vehicle was soon located parked in a trailer park about a half mile away from the restaurant.

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VRP at 259. Ms. Lopez's purse was locked inside her car and Mr. Saiti was inside one of the trailers where he was taken into custody without incident. VRP at 212-214. Upon searching Mr. Saiti, Officer Nawn discovered a small container with a very small non-weighable amount of "residue" stuck to the inside of the container. VRP at 208 - 209. Officer Nawn confiscated the container for later testing. Because the purse was locked in the car, Officer Nawn had Ms. Lopez come to the scene. Ms. Lopez then authorized the officer to enter the car where he searched the purse. VRP at 160. On searching the purse, Officer Nawn had to move numerous items to locate the gun that he had been told was in the purse. VRP at 215, 231 - 232, 157 - 158. With the exception of $80 in cash, all of Ms. Lopez's possessions were still in the bag, including gold jewelry, mail, uncashed paycheck, wallet, etc. VRP at 159.

After Mr. Saiti was arrested and charged, Ms. Lopez met with the prosecutor on a number of occasions and discussed the facts of the case. _____. However, as the trial date approached, Ms. Lopez asked the prosecutor to drop the charges against Mr. Saiti, which the prosecutor declined to do. VRP at 177. Ms. Lopez did not feel that Mr. Saiti intended to steal her car or purse (VRP at 162) and did not believe he knew about the gun. VRP at 167. Because Ms. Lopez was not fully cooperative with the State, officers were sent to contact her and inform her that she would

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be arrested if she did not cooperate. VRP at 139. Then a week before trial, despite the fact that the State had interviewed Ms. Lopez on prior occasions (VRP at 2_____), the State sought to depose Ms. Lopez on May 20, 2015. Record, Notice of Deposition, May 16, 2015, at 174.[1] When Ms. Lopez failed to appear at the deposition, the State obtained a material witness warrant, and had Ms. Lopez arrested on $50,000 bail. Record, Bench Warrant at 184. Ms. Lopez was then forced to give a deposition the day before trial. VRP at 53 - 62. The next day, Ms. Lopez was called by the State as a witness at trial. During the testimony, Ms. Lopez described how she was getting ready to go to work. When Ms. Lopez gives an answer the State does not like, the State questions her about the prior day's deposition. VRP at 53 - 54. The State then asks the court to dismiss the jury so that it can make a motion relating to the testimony. After the jury leaves the courtroom, the State alleges that Ms. Lopez is committing perjury because the State believes she is testifying differently from her deposition, taken the day before that was "sworn under penalty of perjury." VRP at 54 - 55. As a result, that court asks Ms. Lopez, "Do you know what perjury is?" Ms. Lopez answers that she does not. VRP at 56. The court then explained what perjury is and reminds Ms.

[1] The electronic version of the record provided to appellant's counsel is approximately 315 pages. However, the pages appear to be out of order. As a result, counsel will try to include the title of the document, page numbers refer to the electronic file.

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Lopez that she agreed to tell the truth. *Id.* The court states:

> Okay. If you do not tell the truth while you're testifying, the prosecutor is saying that, oh, if I don't think she's telling the truth, I could possibly charge her for perjury. Now, I'm not telling you that that's what you're doing because this isn't a trial about perjury. I'm just warning you that if you do lie under oath and if the State has whatever other information they say they have, that could be a basis for a future criminal charge against you for perjury. Then that's up to the prosecutor whether they wish to pursue that or not. Is that any -- is that clear now what perjury is?

VRP at 56 -57. The court also informs Ms. Lopez that perjury is a crime and a felony. VRP at 57. As a result of these events, Defense counsel informs the court he believes he will need to raise the issue because the witness has "been told that if you don't start responding the way you did yesterday, then, you know, we're going to charge you with [perjury]." VRP at 58. The court attempts to explain to Ms. Lopez that it is not telling her to "answer the questions the way the prosecutor wants you to" (VRP at 59; 60 - 61), and orders the parties to not mention the deposition from a day earlier. VRP at ___. Later in the trial, the defense seeks to raise the issue of prior police contact and Ms. Lopez's arrest for deposition, however, the motion is denied by the Court. VRP at 179, 181 - 186.

After trial, Mr. Saiti is convicted of Possession of Heroin RCW 69.50.4013, Theft of a Motor Vehicle RCW 9A.56.065, Unlawful Possession of a Firearm in the First Degree RCW 9.41.040(1)(a), andUnlawful Possession/Use Of Drug Paraphernalia RCW 69.50.412. At

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sentencing, Mr. Saiti contested the 5-point finding on his criminal history score. However, the court found it proper and used it in sentencing.

Mr. Lopez appeals his convictions and sentence.

ARGUMENTS

I. Standard of review. Sufficiency of the evidence.

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing, *State v. Green,* 94 Wash.2d 216, 220-22, 616 P.2d 628 (1980). This test is applied to each of the "essential elements of the crime." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin,* 88 Wash.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn there from. *State v. Theroff,* 25 Wash.App. 590, 593, 608 P.2d 1254, aff'd, 95 Wash.2d 385, 622 P.2d 1240 (1980)." *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). However, the State is not entitled to inferences where none exist.

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"The State must prove each element of a crime beyond a reasonable doubt." *State v. Strong*, 272 P.3d 281, 167 Wn.App. 206, 210 (Wash.App. Div. 3 2012) citing *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). "The State always has the burden of proving the defendant acted with the necessary culpable mental state." *State v. Coates*, 107 Wn.2d 882, 890, 735 P.2d 64 (1987). The Court will accept the evidence as true, within reason, but will not simply accept as proven the claims made by the prosecution that are based upon such evidence. Those claims must still meet the burden of "guilt beyond a reasonable doubt." "In every criminal prosecution, the State must prove each element of the crime charged beyond a reasonable doubt." *State v. Alvarez-Abrego*, 225 P.3d 396, 154 Wn.App. 351, 371 (Wash.App. Div. 2 2010) citing, *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Although, the court accepts the State's evidence as true, that evidence must still be sufficient to prove each element of the charged crimes beyond a reasonable doubt; the court does not accept the allegations as true because the State is not entitled to inferences where none exist.

The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must not be simply to determine whether the jury was properly instructed, but to determine whether the evidence could

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reasonably support a finding of guilt beyond a reasonable doubt. The standard and test are designed to ensure that the defendant's due process right in the trial court was properly observed. This cannot be done if the State is not held to its burden to prove every element beyond a reasonable doubt. Futher, it is well understood that:

> a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge sitting as a jury. In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction.

State v. Hummel, 72068-6-I citing *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457 (1942); *Bronston v. United States*, 409 U.S. 352, 93 S.Ct. 595, 34 L.Ed.2d 568 (1973). The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must not be simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.

In the current case, the State failed to prove beyond a reasonable doubt that Mr. Saiti ever knew Ms. Lopez's gun was in the her purse. Without such knowledge, Mr. Saiti could not form the requisite criminal intent. The failure to prove these elements beyond a reasonable doubt requires the Court to reverse Mr. Saiti's convictions on these charges. Similarly, the State failed to prove beyond a reasonable doubt that Mr.

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Saiti wrongfully obtained or exerted unauthorized control over Ms. Lopez's car or that he ever formed the requisite "intent to deprive" her of such property.

a. There is insufficient evidence to support a conviction for Unlawful Possession of Firearms

RCW 9.41.040(1)(a) states:

> (1)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

With the exception of strict liability crime, all crimes require a person have knowledge of the criminal act. Without knowledge, it is impossible to form any criminal intent. See, *State v. Anderson*, at 367. Possession necessarily requires a person to have knowledge of an item if he/she is to be criminally culpable for having it within his/her control. Black's Law Dictionary defines "possession" as:

> The detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it and either held personally or by another who exercises it in one's place and name. . . . That condition of facts under which one can exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons.
> The, law in general, recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direst physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual

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> possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

Black's Law Dictionary, 5th ed. at 1047. Washington Courts apply this same definition to possession. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014); *State v. Davis*, 176 Wn.App. 849, 862, 315 P.3d 1105 (Div. 2 2013) (overruled on other grounds); see also, *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Further, the Washington Supreme Court has held that RCW 9.41.040(1)(a) is not a strict liability crime and that the State must "prove a culpable mental state" to obtain a conviction for unlawful possession of a firearm. *State v. Anderson*, 141 Wn.2d 357, 366 - 367, 5 P.3d 1247 (2000). In such a case, the "State has the burden to plead, to instruct, and to prove knowledge in addition to the other statutory elements of unlawful possession of a firearm." *State v. Cuble*, 109 Wn.App. 362, 368, 35 P.3d 404 (Div. 2 2001). Knowledge is an essential element that must be proven beyond a reasonable doubt, and there is no affirmative requirement that is placed on the defendant. *State v. Cuble*, at 369 - 370.

In *State v. Davis*, the Eddie Davis, Douglas Davis, and Letricia Nelson were convicted of various charges including the unlawful possession of a stolen firearm. *State v. Davis*, 176 Wn.App. 849, 856, 315

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P.3d 1105 (Div. 2 2013). In November of 2009, Maurice Clemmons murdered four Lakewood police officers as they sat in a local coffee shop. Clemmons was shot in the process but managed to take one officer's gun before killing the officer and fleeing the scene. *Id.* at 857. Clemmons sought aid from the defendants who were his friends and employees. Clemmons informed the defendants that he had killed the four officers. *Id.* at 859. Clemmons had the officer's weapon with him and received treatment for his wound at a house in Auburn. *Id.* at 858. Sometime during this encounter, the gun was placed in a bag and was, for a period of time, in the control of the defendants. *Id.* at 859 - 860. Clemmons retook possession of the bag with the gun and was killed in a shootout by police a few days later. *Id.* at 860. The Court of Appeals upheld the convictions of Eddie and Nelson, but overturned Douglas's possession convictions. The Court determined that:

> Possession may be actual or constructive. *State v. Callahan*, 77 Wash.2d 27, 29, 459 P.2d 400 (1969). "A defendant has actual possession when he or she has physical custody of the item and constructive possession if he or she has dominion and control over the item." *State v. Jones*, 146 Wash.2d 328, 333, 45 P.3d 1062 (2002). Dominion and control over an object "means that the object may be reduced to actual possession immediately," *Jones*, 146 Wash.2d at 333, 45 P.3d 1062, but dominion and control need not be exclusive. *State v. Cote*, 123 Wash.App. 546, 549, 96 P.3d 410 (2004). Mere proximity, however, is not enough to establish possession. *Jones*, 146 Wash.2d at 333, 45 P.3d 1062.

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State v. Davis, 176 Wn.App. 862. The court looked to "the totality of the circumstances touching on dominion and control" to determine whether the person had possession. *Id.* at 862 - 863. Although the Court noted that in *State v. Callahan,* dominion and control over a residence might be sufficient to infer possession over items in the residence, it was insufficient when the evidence only showed a "momentary handling" or brief proximity to the property, but no dominion over the item. *Id.*, at 864. The Court ultimately overturned Douglas' convictions when it ruled that although Douglas was near the gun, there was no evidence to suggest that he had the ability to "reduce the gun to his actual possession, which is a central criterion of constructive possession." *Id.*, at 869. However, the court found Eddie did have possession of the firearm. The Court explained:

> When he was ready to leave, Clemmons asked, "Where's the gun?" and Eddie replied that the gun was on the counter in the bag and handed the bag to Clemmons. Thus, the evidence definitively established Eddie's knowledge of the presence and location of the gun, and the jury could rationally infer that Eddie was standing in close proximity to the counter and, thus, the gun. In addition to Eddie's knowledge and proximity, he exercised at least passing control over the bag and, thus, the gun, when he handed the bag to Clemmons.

State v. Davis, 176 Wn.App. 866. Thus, "the cumulative weight of this evidence was sufficient to establish that Eddie could immediately reduce the gun to his actual possession, thereby exercising dominion and control

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over it and constructively possessing it." *Id.* The key points here are the defendant had knowledge of the weapon, momentary control, and the ability to do something about taking possession of the weapon. Further, Eddie could exercise this control until he gave the gun back to Clemmons, and this was sufficient to support a conviction. On appeal, the Supreme Court confirmed the lower court's legal analysis relating to possession stating that:

> A person actually possesses something that is in his or her physical custody and constructively possesses something that is not in his or her physical custody but is still within his or her "dominion and control." *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). For either type, "[t]o establish possession the prosecution must prove more than a passing control; it must prove actual control." *State v. Staley*, 123 Wn.2d 794, 801, 872 P.2d 502 (1994). The length of time in itself does not determine whether control is actual or passing; whether one has actual control over the item at issue depends on the totality of the circumstances presented. *Id.* at 802.

State v. Davis, 182 Wn.2d 222, 227, 340 P.3d 820 (2014). The Court confirmed the convictions finding that Eddie's actions in telling Clemmons where the gun was and returning it to Clemmons, demonstrated Eddie had exercised sufficient control over the weapon and knew about it. During the time Clemmons was at Nelson's home, "it is reasonable to infer that someone else decided what to do with the gun and that the decision-makers were Nelson and Davis because Nelson retrieved the shopping bag and put the gun inside it and Davis immediately responded when

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Clemmons asked where the gun was." *State v. Davis*, 182 Wn.2d 228. Possession requires knowledge and the ability to control the firearm.

Another case to deal with the issue of knowledge and mental state in relation to RCW 9.41.040(1)(a) unlawful possession of a firearm is 141 Wn.2d 357, 5 P.3d 1247 (2000). In that case the lower court ruled that RCW 9.41.040 was actually a strict liability crime, which made it unnecessary for the State to prove intent; the Supreme Court disagreed.

> After considering all of the factors that are to assist us in determining if the Legislature intended to place the burden on the State to prove a culpable mental state, we conclude that it did. Our decision is influenced greatly by the harshness of the statutory penalty, the legislative history, and the absence of a showing of sufficient danger to the public to overcome the general rule favoring a mental element in felony statutes. Most compelling, though, is the fact that entirely innocent conduct may fall within the net cast by the statute in question. The danger of this is not, in our view, mitigated by the existence of an affirmative defense of unwitting conduct that the Court of Appeals has recognized. The burden of proof to establish such a defense resides with the defendant thus relieving the State of its traditional burden to prove each element of the crime by evidence, which is convincing beyond a reasonable doubt.
>
> In sum, if we were to conclude that the offense is a strict liability crime, we would be flying in the face of the strongly rooted notion that strict liability crimes are disfavored. In that regard, no less authority than the United States Supreme Court has expressed this view with which we agree:
>
> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."
>
> We are loath, in short, to conclude that the Legislature

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> intended to jettison the normal requirement that mens rea be proved.

State v. Anderson, at 366 - 367 (citations ommited). Thus, Knowledge is an essential element of the crime and must always be proven beyond a reasonable doubt by the State. Also, in *State v. Cuble*, division II of the Court of Appeals confirmed the "State has the burden to plead, to instruct, and to prove knowledge in addition to the other statutory elements of unlawful possession of a firearm." *State v. Cuble*, 109 Wn.App. 362, 368, 35 P.3d 404 (Div. 2 2001). The Court ruled that "[a]lthough the statute does not expressly mention "knowledge" as an element of unlawful firearm possession, our Supreme Court has held that this crime implicitly includes "knowledge" as a necessary element." *State v. Cuble*, at 367 citing *State v. Anderson*, 141 Wash.2d 357, 362, 5 P.3d 1247 (2000).

The jury instructions properly included knowledge as an element of the unlawful possession of a firearm charge, however, the State failed to present sufficient evidence to prove beyond a reasonable doubt that Mr. Saiti knew the gun was in Ms. Lopez's purse. "The State need not prove that the defendant knew that possession of a firearm was unlawful. But it must prove that the defendant knew he possessed the firearm." *State v. Marcum*, 116 Wn.App. 526, 535, 66 P.3d 690 (Div. 3 2003) citing *State v. Anderson*, 141 Wash.2d at 361, 5 P.3d 1247.

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In the current case, the State presented evidence showing Ms. Lopez's gun was in her purse on the day in question, but it presented no evidence that Mr. Saiti actually knew the gun was in the purse. The State called only two witnesses who had any knowledge of the gun. Ms. Lopez and Officer Nawn. The Defense called no witness, so the only evidence came from the State's witnesses. VRP at 263. The Court will accept truth of the State's evidence and all inferences that reasonably can be drawn from it. *State v. Davis*, 176 Wn.App. 849, 861, 315 P.3d 1105 (Div. 2 2013), citing *State v. Salinas,* 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). This evidence is sufficient only if "when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt." *Id.*, citing *State v. Hosier,* 157 Wash.2d 1, 8, 133 P.3d 936 (2006).

Ms. Lopez testified she had her gun in her purse along with a number of other items and she took it with her to work, placing it in the kitchen. VRP at 64, 69. After Mr. Saiti made several unsuccessful attempts to get money from Ms. Lopez, Mr. Saiti is seen leaving the restaurant with the purse and taking the car. VRP at 65. The keys were at the top of the items in the purse. VRP at 155. Ms. Lopez was asked about Mr. Saiti's knowledge of the gun. Ms. Lopez stated that Mr. Saiti saw it only one time when she first bought it and placed it in her purse. VRP at

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75 - 77. Ms. Lopez's does not say when this happened, but it occurred sometime between July and December of 2016. Ms. Lopez states she kept the gun in her purse, but there is no testimony that Mr. Lopez knew this to be the case. Ms. Lopez also testifies she only has the one gun, but there is no evidence relating to Ms. Lopez's knowledge in this regards. VRP at 81. This is testimony about Ms. Lopez's knowledge, not Mr. Saiti's. Further, none of the other witnesses called by the State ever saw Mr. Saiti with the gun. The officers testified they didn't see Mr. Saiti with a gun. VRP at 102, 229. The Officers only believed that Mr. Saiti might be armed. VRP at 207. Only one witness, Amy Leback, saw Mr. Saiti with the purse, and she did not know what was in the purse. VRP at 110. This is not evidence of knowledge. Essentially, the State has only demonstrated that Mr. Saiti was aware, at some unknown point in time, that Ms. Lopez owned a gun. This should be enough to demonstrate the insufficiency of the State's evidence. In *State v. Davis* the court threw out the convictions of a defendant where the State never provided any evidence that the defendant held the gun despite the fact that he knew of the gun, knew where it was, and was in the general area. *State v. Davis*, 176 Wn.App. 849, 315 P.3d 1105 (Div. 2 2013).

However, on cross examination the defense inquired further about the gun. Ms. Lopez testifies she has at least ten purses that she changed on

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a weekly basis and that Mr. Saiti never saw her moving the gun. VRP at 171 - 172. We now know several additional facts from the state's own witness, about what Mr. Saiti knew of the gun. First, Mr. Saiti only saw the gun once, on the day Ms. Lopez put it into her purse for the first time. Second, we learn that Ms. Lopez had at least ten different purses that she switched out on a weekly bases. Third, Ms. Lopez moved the gun from purse to purse. And fourth, Mr. Saiti had no knowledge whatsoever as to what Ms. Lopez did with the gun in the weeks and months after Ms. Lopez showed it to Mr. Saiti on that single occasion.

In addition, Ms. Lopez relates that the purse she used on the date in question was a very large purse. VRP at 156, 157. The purse contained a lot of different items. VRP at 157 - 158. The purse had a black lining that was the same color as the holster. VRP at 156 - 158. It would have been difficult to find the gun unless someone actually attempted to look for it. In fact, Officer Nawn testified he had to move things around to find the gun when he searched the purse. VRP at 215. This was necessary even though Officer Nawn had been told that day there was a gun in the purse. Officer Nawn also testified he did not take the gun into evidence and did not test it for prints, making it impossible to prove whether or not Mr. Saiti ever touched the firearm. VRP at 234. Further, the only items that were missing from the purse were the cash and keys. All of the other items

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remained in the purse. VRP at 72. There is no evidence Mr. Saiti searched the purse or rummaged through the items therein. Mr. Saiti did not have to remove the keys, but there is testimony the keys were on top of the purse. VRP at 155. There is no testimony at all as to where the $80 in cash was located in the purse.

Taking all of the State's evidence as true and inferring all reasonable inferences to that evidence in favor of the State only proves Mr. Saiti was aware, at some time, that Ms. Lopez owned a gun. Mr. Saiti only saw the gun once and there is not even any evidence that he remembered the gun existed. In fact, Ms. Lopez testified she did not believe Mr. Saiti knew the gun was in the purse because he never paid any attention to it. VRP at 166 - 168. The State has the burden to prove beyond a reasonable doubt Mr. Saiti knew that the gun was in the purse on December 20, 2015. *State v. Anderson*, at 359, 366 - 367. Showing Mr. Saiti was aware Ms. Lopez owned a gun weeks, if not months, before the date in question does not meet this burden. Absent evidence showing Mr. Saiti had direct contact with the gun or actually knew the gun was in the bottom of the purse, no "rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt." Because the State failed to prove Mr. Saiti knew Ms. Lopez's gun was in the purse it failed to prove the essential element of "knowledge,"

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the conviction for Unlawful Possession of a Firearm must be reversed.

b. There is insufficient evidence to support a conviction for Theft of A Motor Vehicle.

The State's case against Mr. Saiti for theft of a motor vehicle also fails for lack of sufficient evidence on essential elements of the charged crime of Theft of a Motor Vehicle. The same standard for sufficiency of evidence apply to this charge as those discussed in section I above. RCW 9A.56.065 defines Theft of a Motor Vehicle as "[a] person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle." Theft is, in turn, defined as:

> (1) "Theft" means:
> (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
> (b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
> (c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

RCW 9A.56.065(a). These elements were conveyed to the jury in Jury Instruction No. 13. Pursuant to RCW 9A.56.065(a) and the "to convict" jury instruction, the State had to prove beyond a reasonable doubt that Mr. Saiti "wrongfully obtain or exert unauthorized control over the property" and that he had the "intent to deprive" the victim of her property. However, the State presented no evidence that Mr. Saiti "intended to

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deprive" Ms. Lopez of her vehicle.

Evidence at trial showed Mr. Saiti and Ms. Lopez lived together. VRP at 121. Mr. Saiti regularly used Ms. Lopez's car. VRP at 121, 149. Mr. Saiti often used the car without Ms. Lopez being present. VRP at 115. Mr. Saiti used the car to run errands. Mr. Saiti used the car to drive Ms. Lopez's daughter to different places. VRP at 149. The Camry was the only mode of transportation available to Mr. Saiti. VRP at 150, 169. Mr. Saiti occasionally bought gas for the car. VRP at 169. The State acknowledged Ms. Lopez "is the State's only witness to testify that she did not give Mr. Saiti permission to take her vehicle, purse and handgun." Record, Motion for a Bench Warrant, May 20, 2016, at 177. Although Ms. Lopez did say she did not tell Mr. Saiti he could take the car on December 20, 2015, she did not tell Mr. Saiti he could not take the car. If fact, there is no testimony at all that during the entire time that Ms. Lopez and Mr. Saiti lived together, that Mr. Saiti was ever told he had to ask to take the car. See, VRP generally. Instead, Ms. Lopez testified she did not discuss the car with Mr. Saiti. VRP at 161. Ms. Lopez testified Mr. Saiti used the car on a regular basis. VRP at 149 - 150. Ms. Lopez testified that had Mr. Saiti asked to take the car, she would have said "yes." VRP at 161. Ms. Lopez also testified that she did not think Mr. Saiti stole the car. VRP at 162. And Ms. Lopez testified she knew Mr. Saiti would return the car.

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VRP at 161. This is confirmed by the fact that in order for Mr. Saiti to get back home, he would have had to drive the car back to the apartment where he lived with Ms. Saiti. Further, there is no evidence Mr. Saiti made any effort or had any intent to dispose of the car in any way. See, VRP generally. This is not just insufficient evidence of intent to deprive; it's actually clear evidence that Mr. Saiti had no intent to deprive Ms. Lopez of her car. Even if we take the State's evidence as true and grant it all inferences that reasonably can be drawn there from it (*State v. Theroff*, 25 Wash.App. 590, 593, 608 P.2d 1254, aff'd, 95 Wash.2d 385, 622 P.2d 1240 (1980)." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).), the evidence presented by the State shows Mr. Saiti did not even attempt to steal the car.

"Intent to deprive" is an essential element of the crime of theft. *State v. Kenney*, 23 Wn.App. 220, 224-25, 595 P.2d 52 (1979). The State's failure to prove the essential element "Intent to deprive" beyond a reasonable doubt requires reversal of Mr. Saiti's convictions and dismissal of the case with prejudice.

1. Aggravating circumstances

The State alleged two aggravating circumstances applied to theft of a motor vehicle. These were: 1) "the defendant used his or her position of trust, confidence, fiduciary responsibility, to facilitate the commission of

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the crime;" and 2) "the crime involved an invasion of the victim's privacy." Jury Instruction No. 17. The State had the burden of proving these aggravating circumstances beyond a reasonable doubt. Jury Instruction No. 16. However, the State failed to meet its burden because it presented no evidence these aggravating circumstances played any role in the alleged crime. The testimony was that Mr. Saiti went to the kitchen without Ms. Lopez's knowledge, obtained her purse and keys and left in the car. This is not using a "position of trust" to do anything. Mr. Saiti did not lie to Ms. Lopez to gain access to the keys. Mr. Saiti did not trick Ms. Lopez. Mr. Saiti did not work at the restaurant; he simply walked through the kitchen without anyone's knowledge. Nor are Mr. Saiti's actions a violation of privacy. Ms. Lopez was not present when Mr. Saiti took purse and keys, and the purse was sitting on a chair in an open room. This is not a privacy issue. Further, the car was located in a public parking lot and Ms. Lopez was inside the building. The fact Ms. Lopez and Mr. Saiti lived together does not mean that everything Mr. Saiti does in the presence or out of Ms. Lopez's presence becomes an issue of "trust" and/or "privacy." Mr. Saiti must actually use a "position of trust" to effectuate a specific goal, or actually invade Ms. Lopez's privacy. This did not happen and the aggravating circumstances should be disallowed. Allowing the finding of the aggravating circumstances to be used in this case would make them

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applicable in any case where the defendant knows the alleged victim, regardless of whether or not they actually played a role in the case. Because there is an insufficiency of evidence to support the aggravating circumstances this matter should be remanded for resentencing.

II. Constitutional violation of right to confrontation

The State's main witness in relation to the charges of Theft of a Motor Vehicle and Unlawful Possession of a Firearm in the First Degree was Ms. Lopez.[2] As the State's main witness on these issues, the believability of Ms. Lopez's testimony and the ability to impeach her version of the facts was essential to the defense. The right of the defense to impeach an accuser is protected by Confrontation Clause of the Sixth Amendment.

The Confrontation Clause of the Sixth Amendment states that, "[i]n all prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. Amend. VI. The primary purpose of the Confrontation Clause is to protect the right of cross-examination. *See Pointer v. Texas*, 380 U.S. 400, 404, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). "[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose infirmities through cross-examination, thereby calling to the attention of

[2] Ms. Lopez was also the main witness for several other charges for which Mr. Saiti was acquitted.

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the fact finder the reasons for giving scant weight to the witness' testimony." *Delaware v. Fensterer,* 474 U.S. 15, 22, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985). Due to the constitutional importance of cross-examination, courts give defense counsel wide latitude in impeachment questioning of prosecution witnesses. *See Delaware v. Van Arsdall,* 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986); *State v. Spencer*, 111 Wn.App. 401, 410, 45 P.3d 209 (Div. 2 2002). Although trial judges have discretion to reasonably limit cross-examination, they may not impose restrictions until the defendant has been afforded the basic threshold of inquiry allowed by constitutional mandate, *i.e.,* until the defense has been given an opportunity to present the fact finder with enough information to make a discriminating appraisal of the reliability, possible biases, motivations, and credibility of the prosecution's witness. *See State v. Van Arsdall,* 475 U.S. at 679-80, 106 S.Ct. at 1435-36; *Davis v. Alaska,* 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974); *Martin v. State,* 364 Md. 692, 698-99, 775 A.2d 385 (2001); *Smallwood v. State,* 320 Md. 300, 307, 577 A.2d 356 (1990). Accordingly, cross-examination to impeach the credibility of a witness, by showing lack of veracity, bias, interest, or motive to testify favorably for the State, is a matter of constitutional right, and the trial court "retains wide latitude" only "to impose reasonable limits ... based on concerns about ...

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harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 106 S.Ct. 1431, 475 U.S. 673, 679 (1986).

Ms. Lopez's testimony was central to the State's case because she was the only witness who might testify as to the intent of Mr. Saiti to commit theft relating to RCW 9A.56.065 and the knowledge requirement of RCW 9.41.040(1)(a). Indeed, because both the motor vehicle and the purse that contained the gun belonged to Ms. Lopez, her testimony was crucial in obtaining a conviction on these charges. To the extent that any evidence was presented by the State that Mr. Saiti "wrongfully" (i.e. without permission) form the "intent to deprive," only Ms. Lopez had personal knowledge of any conversations that took place with Mr. Saiti. Only Ms. Lopez had personal knowledge of Mr. Saiti's knowledge of the gun. Amy Leback saw Mr. Saiti leave the restaurant, but she could not provide any information as to Mr. Saiti's knowledge and intent.

Ms. Lopez is originally from Mexico. VRP at 144. Although Ms. Lopez's English is reasonably good, she is apparently uncomfortable with the language. As a result, she had her coworker, Amy Leback, write out her statement as she comfortable "writing out complete sentences, so." VRP at 113. Ms. Lopez signed this statement and met with the prosecutor on several occasions. _____. Despite initially cooperating with the State,

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Ms. Lopez felt that at least some of the charges should be dropped and asked the State to do so. After the State declined to dismiss the charges, Ms. Lopez became uncooperative. VRP at 177 - 178. Shortly before trial, law enforcement contacted Ms. Lopez and told her that she might be arrested if she refused to cooperate. VRP at 188. Then one week before trial, the State sought to depose Ms. Lopez. Despite the fact the State had met with Ms. Lopez on prior occasions and _____ only authorizes depositions where the State has been unable to meet with the witness, the court ordered the deposition to take place on May 20, 2015. Record at 171; CrR 4.6. However, Ms. Lopez failed to appear and the State obtained a material witness warrant with a bail amount of $50,000. Record, Order Directing Issuance, May 20, 2015, at 179. Ms. Lopez was subsequently arrested, jailed and forced to testify at a deposition on July 23, 2015. _____. Ms. Lopez signed the deposition statement subject to penalty of perjury. The following day at trial, Ms. Lopez was being questioned by the State on direct. The prosecutor asks Ms. Lopez if during the time she was getting ready for work, she had a conversation with Mr. Saiti, to which Ms. Lopez responds negatively stating that she was getting ready for work. VRP at 52. It is not clear whether Ms. Lopez misunderstood the question due to the language issue, whether she was forgetful, or being uncooperative, but the State now raises the issue of the deposition directly

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in front of the jury in the following exchange.

> Q. Ms. Lopez, do you remember being here yesterday?
> A. Oh, yes. Yes.
> Q. Do you remember giving an interview?
> A. Yes. Sorry.
> Q. Where I was present?
> A. Yes.
> Q. Mr. Needham was present?
> A. Yes.
> Q. Ms. Nogueira was present?
> A. Yes.
> Q. Do you remember that?
> A. Yes.
> Q. Do you remember also Bonnie Walker from my office was present?
> A. Yes.
> Q. Do you remember what you said during that interview, what took place before you came down to work that day?
> A. Yes. He -- he asked me for money. And I said no. And I went to work.
> Q. Was it just a simple question that he just asked for money?
> A. Yeah. Simple question.
> Q. Was that in the terms of an argument?
> A. No. Not really. No.
> MR. RICHTER: Your Honor, I'm going to ask to make a motion at this time, if I can, to make a motion.

VRP at 53 - 54. The court then excuses the jury and hears the motion on the record. In its motion, the State announces Ms. Lopez is not testifying as she did "yesterday" in the deposition and accuses her of committing perjury because there were "several witnesses that heard the interview as well as the officer of the court and the statement that Ms. Lopez gave, signed the day of that is sworn under penalty of perjury." VRP at 55. The court then questions the witness and asks her, "Do you know what perjury

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is?" And Ms. Lopez answers, "No, I don't." *Id.* This response should raise immediate concerns with the prior sworn statement, because it indicates the witness did not know it was subject to perjury raising doubt as to its trustworthiness. As a result, the court explains to Ms. Lopez that it means she promised to tell the truth. VRP at 56. The Court then tells Ms. Lopez the following:

> THE COURT: Okay. If you do not tell the truth while you're testifying, the prosecutor is saying that, oh, if I don't think she's telling the truth, I could possibly charge her for perjury. Now, I'm not telling you that that's what you're doing because this isn't a trial about perjury. I'm just warning you that if you do lie under oath and if the State has whatever other information they say they have, that could be a basis for a future criminal charge against you for perjury. Then that's up to the prosecutor whether they wish to pursue that or not. Is that any -- is that clear now what perjury is?
> THE WITNESS: Yes.

VRP at 56 - 57. The court adds that "It's a crime. A class B felony. What it is." VRP at 57. After, some discussion about Ms. Lopez being a hostile witness, defense raises the issue that Ms. Lopez is being pressured to testify in a certain way.

> MR. NEEDHAM: . . . I have a whole huge problem in the way that this conversation is going, because now we've got a witness who has been told outside the presence of the jury that if she continues to do what she's going to do, she is going to potentially be charged with perjury. I'm reading between the lines.
> THE COURT: You are. That's not what the Court told her. But yes. I understand what you're saying.
> MR. NEEDHAM: You know, now we've got an outside factor that's potentially influencing Ms. Lopez here that, quite frankly, I think we're entitled to tell the jury about.

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> THE COURT: What's the outside factor now? The fact that she's told you're supposed to tell the truth?
> MR. NEEDHAM: It's not the outside factor she's supposed to tell the truth. It's the outside factor that she's just been told that if you don't start responding the way you did yesterday, then, you know, we're going to charge you with percentage. That's what I'm hearing.

VRP at 58. The court then attempted to correct the problem by telling Ms. Lopez the following:

> THE COURT: Well, first of all, to the witness, you're supposed to testify truthfully. If you don't remember, you don't remember. That's the way it goes. That's not perjury. Mr. Needham has a good point in that probably I need to hear some more answers of what the answers are going to be rather than just I don't remember the statement. That's true. You have to knowingly make a statement opposite of what you said earlier under penalty of perjury. So all the Court expects you to do is to follow your oath that you would tell the truth. If you're uncertain about an answer, then you just say, "I don't remember, I'm uncertain," or something like that. But you're not being instructed, at least not by this Court, to somehow tell you that if you don't change your tune and answer the questions the way the prosecutor wants you to, that it's perjury. That's not perjury. And I'm not on the prosecutor's side. I'm not on the defense side. So all you need -- you don't need to worry about a thing. Just tell the truth the best you know it. If you don't remember, then you don't remember. The prosecutor then can follow the rules to use the statement that you wrote to remind you of this and that and the other, and the attorneys know how that works.

VRP at 59. The court also adds again that it is "not telling you to agree with what the prosecutor might want you to say." VRP at 60. Later the court tells Ms. Lopez "Don't even worry about it." VRP at 62. After this exchange, the jury is brought back to the courtroom and testimony

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continued. The following day when Ms. Lopez returns to the stand for cross examination, she is told that she is not to mention anything about the material witness warrant, arrest, deposition, or any contacts with law enforcement. VRP at 138 - 140. After additional testimony, the jury is excused to allow the defense to make a motion seeking permission

> MR. NEEDHAM: Your Honor, we would have a motion to allow the defense to introduce into evidence the material witness arrest, the information or at least the belief that Ms. Lopez had when she was contacted by law enforcement. We believe it's relevant to her testimony after the State's cross -- recross of her following our cross. The State has had her read into the record that she signed documents under penalty of perjury. She's clearly demonstrated today that she feels some kind of pressure to be here. She has -- you know, did request that charges be dropped in this case. They were not. We believe this was relevant to show her bias or prejudice or bias in this case as to her credibility as a witness in the State's case in chief. It's not my intention to beat her up. It's not my intention to tear her apart and it's not my intention to have her have to relive this, but I certainly think that the experiences that she has been through have greatly influenced her ability to testify today.

VRP at 181 - 182. The State objected on the grounds that it was not relevant, claiming the State didn't put any "undue or illegal pressure" on Ms. Lopez, and the probative value was outweighed by "unfair prejudice to the State's case." VRP at 183. The court denied the motions and excluded the evidence. VRP at 186 - 187.

There are several problems that bear directly on the witness' ability/willingness to testify truthfully. We have a witness who may not have the best command of the English language. Ms. Lopez is contacted

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by police and threatened with arrest if she does not cooperate. Ms. Lopez was then actually arrested and jailed subject to $50,000 bail and forced to testify the day before trial. The next day, when she does not testify exactly as the State wanted, she is accused of committing perjury, a term she did not understand. Ms. Lopez is then told that she can be charge with a class B felony and go to prison. Ms. Lopez clearly feels pressured by these facts. And despite the fact the court told Ms. Lopez not to worry about it, any reasonable person would feel pressured to answer the way the State wanted. Additionally, the State had opened the door to this information by discussing the "interview" from the prior morning in front of the jury. *State v. Gefeller*, 458 P.2d 17, 76 Wn.2d 449, 455 (Wash. 1969). These facts clearly impact the witness' credibility and entitled the defense to explore the issues during cross-examination.

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Nevada v. Jackson*, 133 S.Ct. 1990, 569 U.S. ___ (2013) citing *Crane v. Kentucky,* 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (quoting *California v. Trombetta,* 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)). The Confrontation Clause protects the ability of criminal defendants to explore the credibility of the witnesses against him/her. Therefore,

a criminal defendant states a violation of the Confrontation Clause

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> by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.

Olden v. Kentucky, 109 S.Ct. 480, 488 U.S. 227, 102 L.Ed.2d 513 (1988) citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986). The Confrontation Clause that the defense be given a full and fair opportunity to probe and expose these infirmities of a witness' testimony. *Nevada v. Jackson*, 133 S.Ct. 1994; *Delaware v. Fensterer*, at 22.

State may establish rules governing the admissibility of evidence; however, the purpose is to ensure the evidence relates to the issues at trial and credibility of witnesses. "The scope of cross examination to impeach a witness's credibility is a decision within the trial court's discretion. The trial court abuses its discretion only when the decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons." *State v. Freeburg*, 120 Wn.App. 192, 84 P.3d 292 (Div. 1 2004) citing *State v. Russell,* 125 Wash.2d 24, 92, 882 P.2d 747 (1994) and *State v. McDaniel,* 83 Wash.App. 179, 184-85, 920 P.2d 1218 (1996); *State v. McDaniel*, 83 Wn.App. 179, 184 - 185, 920 P.2d 1218 (Div. 1 1996).

"The admissibility of evidence offered to impeach the credibility of a witness is governed by ER 607, which provides that '[t]he credibility of a witness may be attacked by any party, including the party calling

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him.'" *State v. Lavaris*, 106 Wn.2d 340, 344, 721 P.2d 515 (1986); ER 607. Although some types of impeachment are precluded or restricted, these limitations do not apply to intimidation or discussion of pressure placed on a witness that might tend to cause him/her to tell a specific version of events that are not correct. See, ER 608; ER 609; and ER 610. According to ER 611, "Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." ER 611(b). This general statement allows wide latitude in raising matters that affect the witness' credibility. "It is fundamental that a defendant charged with the commission of a crime should be given great latitude in the cross-examination of prosecuting witnesses to show motive or credibility." *State v. Spencer*, 111 Wn.App. 401, 45 P.3d 209 (Div. 2 2002) citing *State v. Wilder*, 4 Wn.App. 850, 854, 486 P.2d 319 (Div. 2 1971). "This policy reflects the constitutional requirement that the defendant is able to impeach witness credibility. The constitutional requirement serves as a broad backdrop, against which the rule requiring foundation is best viewed as an exception." *Id.* citing *Davis,* 415 U.S. 308, 316-18, 94 S.Ct. 1105, 39 L.Ed.2d 347.

In *State v. McDaniel*, the court noted that:

> The Sixth Amendment to the United States Constitution and Const. art. 1, § 22 guarantee criminal defendants the right to confront and cross-examine adverse witnesses. Although this right is of

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> constitutional magnitude, it is subject to the following limits: (1) the evidence sought to be admitted must be relevant; and (2) the defendant's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process.

State v. McDaniel, 83 Wn.App. 179, 920 P.2d 1218 (Div. 1 1996) citing *Washington v. Texas,* 388 U.S. 14, 16, 87 S.Ct. 1920, 1921-22, 18 L.Ed.2d 1019 (1967); *State v. Hudlow,* 99 Wash.2d 1, 15, 659 P.2d 514 (1983); *State v. Gallegos,* 65 Wash.App. 230, 236-37, 828 P.2d 37, review denied, 119 Wash.2d 1024, 838 P.2d 690 (1992). The motivation of a witness to testify falsely of truthfully is relevant to his/her credibility. *State v. McDaniel*, at 186 - 187. The pressure put on Ms. Lopez to testify the way the State wanted due to the threat of a perjury conviction is just as relevant as a plea agreement or threat of a parole violation. In *State v. McDaniel*, the court found that the witnesses "motivation to lie based on the conditions of her probation" was relevant to the case. *State v. McDaniel*, at 187. Once the testimony is deemed relevant, the court must balance the competing interests of the State and the Defendant.

Before it can prevent a defendant from presenting relevant evidence, the State "must demonstrate a compelling state interest". *State v. McDaniel*, at 185. The motivation of a witness to misrepresent the facts is a highly relevant issue. *State v. McDaniel*, at 186; *Delaware v. Van Arsdall*, at 475 U.S. 678; Olden v. Kentucky, at 231. The fact the State

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feels the evidence may prejudice its case (VRP at 183) is not a "compelling state interest," as any evidence that conflicts with the State's theory of the case would prejudice its case. Nor is the claim that the State did not put any "undue or illegal pressure" on Ms. Lopez a "compelling state interest." The relevant interest is not what the State did because that relates to the motives of a third party non-witness, but what the witness felt and perceived is relevant. In determining whether a "compelling state interest" exists, the Court must look to the evidence as it relates to the witness being impeached. *Delaware v. Van Arsdall*, 106 S.Ct. 1431, 475 U.S. 673, 680 (1986) ("the focus of the Confrontation Clause is on individual witnesses"). The evidence in this case was directly related to the case at hand. It deals with actions and pressures that were brought to bear on the witness during the pendency of the case and in the courtroom during trial. The State presented no grounds to support a claim that it has a "compelling state interest" that would override Mr. Saiti's constitutional rights.

At trial, the State argued that ER 403 excluded the evidence. That rule states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

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ER 403. However, the State never explained how this applied nor did the court find that it did. Instead, the court stated that it had not "heard anything from this witness that she somehow was pressured to testify in the way that she testified" and reasoned that everyone feels "pressured." VRP at 186. The trial court went on to state it had not heard anything that "indicates that she's saying something because she's pressured by the police." VRP at 187. However, this is not the test. The State must show a "compelling state interest" that outweighs the defendant's constitutional rights. *State v. McDaniel*, at 185. Additionally, the trial court's reasoning is faulty, because it found there was no pressure before the defense was allowed to cross-examine the witness about the pressure. This is like saying; "you cannot ask any questions because I have not heard any answers." The trial court may "impose reasonable limits" on cross examination, but it may not cut off all questioning into the witness' motives behind her testimony. *Delaware v. Van Arsdall*, 106 S.Ct. 1431, 475 U.S. 673, 679 (1986). The trial court failed to apply the correct test to relevant evidence. The trial court failed to find a "compelling state interest" to disallow the credibility evidence, and violated the Confrontation clause. Relevant evidence is admissible unless its potential for prejudice substantially outweighs its probative value. *State v. Thomas*,

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150 Wn.2d 821, 870, 83 P.3d 970 (2004); ER 403. As a result, the trial court's decision was an abuse of discretion because it is manifestly unreasonable, and was exercised on untenable grounds or for untenable reasons. *State v. Freeburg*, 120 Wn.App. 192, 84 P.3d 292 (Div. 1 2004) citing *State v. Russell*, 125 Wash.2d 24, 92, 882 P.2d 747 (1994) and *State v. McDaniel*, 83 Wash.App. 179, 184-85, 920 P.2d 1218 (1996); *State v. McDaniel*, 83 Wn.App. 179, 184 - 185, 920 P.2d 1218 (Div. 1 1996).

> A violation of a defendant's rights under the confrontation clause is constitutional error. *Dickenson*, 48 Wash.App. at 470, 740 P.2d 312 (citing *Harrington v. California*, 395 U.S. 250, 251-52, 89 S.Ct. 1726, 1727-28, 23 L.Ed.2d 284 (1969)). Constitutional error is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless. *State v. Guloy*, 104 Wash.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). In determining whether constitutional error is harmless, Washington courts use the "overwhelming untainted evidence test," under which appellate courts look only to the untainted evidence to decide if it is so overwhelming that it necessarily leads to a finding of guilt. Guloy, 104 Wash.2d at 426, 705 P.2d 1182; Dickenson, 48 Wash.App. at 470, 740 P.2d 312.

State v. McDaniel, at 187 - 188. In Mr. Saiti's case, because only Ms. Lopez's had any bearing on the essential elements of "intent to deprive" (theft of a motor vehicle) and "knowledge" (that the gun was in the purse) there is no evidence that is untainted by violation of the Confrontation Clause. As a result, the error cannot be harmless.

Because the trial court violated its discretion by preventing cross-

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examination of prosecuting witnesses for credibility issues and this violated Mr. Saiti's constitutional rights, the Court must vacate Mr. Saiti's convictions for counts II Theft of a Motor Vehicle and IV Unlawful Possession of a Firearm in the First Degree.

III. The Court erred in comparing California Grand Theft conviction to First Degree theft. The charge more correctly corresponds to Third Degree Theft, a Gross Misdemeanor.

In 2009, Mr. Saiti pled guilty to Attempted Grand Theft and was sentenced to six months in jail. Record, California sentencing form, dated 11/10/2009, at 25. The charge is identified on the California Superior Court sentencing form, dated 11/10/2009, as PC 664/487(c). As the Prosecutor noted at the Washington sentencing hearing, PC 664 is the attempt statute. Ca. Pen. Code § 664. PC 487(c) is the grand theft statute for "When the property is taken from the person of another." Ca. Pen. Code § 487(c). At the Washington sentencing hearing, defense counsel argued that the Grand Theft charge should be treated as a misdemeanor and that Mr. Saiti's should have four points counted towards his offender score for out-of-state convictions. The State argued that it was a felony and there should be five points for the out-of-state convictions. VRP at 349. The Court agreed with the state and applied five points. VRP at 361 - 362. Because of the complexities of California law, none of the parties applied the correct analysis and Mr. Saiti believes that the correct score

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should be four points.

Washington law requires that "Out-of-state convictions for offenses shall be classified according to the comparable offense definitions sentences provided by Washington law." RCW 9.94A.525(3). Under the Sentencing Reform Act (SRA), the state bears the burden to prove the existence and comparability of a defendant's prior out-of state conviction. *State v. Thomas*, 135 Wn.App. 474, 487, 144 P.3d 1178 (Div. 1 2006); RCW 9.94A.010. To determine a proper comparison, it is necessary to evaluate the relevant California statutes and then locate a proper fit in Washington statutes. If there is no direct correlation, the Rule of Lenity dictates that the defendant receive the benefit of the more favorable determination. *State v. Gore,* 101 Wash.2d 481, 486, 681 P.2d 227 (1984) citing *State v. Sass,* 94 Wash.2d 721, 620 P.2d 79 (1980); *State v. Workman,* 90 Wash.2d 443, 584 P.2d 382 (1978); *Seattle v. Green,* 51 Wash.2d 871, 322 P.2d 842 (1958); see also *State v. Baker*, 194 Wn.App. 678, 378 P.3d 243 (Div. 3 2016). (rule of lenity will be applied to offender scores).

In California levels of criminal conduct are defined as follows:

> A felony is a crime that is punishable with death, by imprisonment in the state prison, or notwithstanding any other provision of law, by imprisonment in a county jail under the provisions of subdivision (h) of Section 1170. Every other crime or public offense is a misdemeanor except those offenses that are classified

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as infractions.

Ca. Pen. Code § 17(a). There are no "gross misdemeanors" in California. In California "grand theft" is not defined as a felony or misdemeanor. This definition is discretionary except in specific circumstances. This type of statue is referred to as a "wobbler" and can be either a felony or misdemeanor. See, *People v. Sauceda*, __ Cal.Rptr.3d __, 3 Cal.App.5th 635, 641 (2016); *Davis v. Municipal Court*, 249 Cal.Rptr. 300, 46 Cal.3d 64, 70, 757 P.2d 11 (1988). The punishment for Grand Theft is described in California as follows:

> Grand theft is punishable as follows:
> (a) When the grand theft involves the theft of a firearm, by imprisonment in the state prison for 16 months, two, or three years.
> (b) In all other cases, by imprisonment in a county jail not exceeding one year or pursuant to subdivision (h) of Section 1170.

Ca. Pen. Code § 488. Because Mr. Saiti's conviction in 2009 did not involve the theft of a firearm, section (b) applies and Mr. Saiti could only be sentenced to "jail not exceeding one year or pursuant to subdivision (h) of Section 1170." In Washington, a jail sentence of one year would be classified as a "gross misdemeanor." See, RCW 9A.20.021. This is also true in California except for certain discretionary case sentenced "pursuant to subdivision (h) of Section 1170." Ca. Pen. Code § 17(a), § 488. Ca. Pen. Code § 1170(h)(1) and (2) restates the punishment in the same terms as Ca. Pen. Code § 488. However, the other sections allow for enhancements

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for violent criminals and other deviations. Ca. Pen. Code § 1170. As the sentence for grand theft is stated in Ca. Pen. Code § 488, it is "imprisonment in a county jail not exceeding one year." This is confirmed by the fact that when Mr. Saiti was convicted of Attempted Grand Theft, his sentence was half that of the sentence required by Ca. Pen. Code § 488. This is mandated by Ca. Pen. Code § 664(b). Washington law dictates that convictions for "anticipatory offenses of criminal attempt" should be treated as if they "were for a completed offense." RCW 9.94A.525(6). Therefore, the Attempted Grand Theft conviction is treated as Grand Theft. However, the attempt conviction is still important because it confirms they were are dealing with a maximum one-year jail sentence, which is the equivalent of a gross misdemeanor in Washington, not a class C felony (or higher) that carries a maximum prison sentence of up to 5 years. RCW 9A.20.21.

The maximum sentence for this crime in California indicates we are actually dealing with a gross misdemeanor in Washington law. However, it is still necessary to determine the comparable statute to complete the analysis. Ca. Pen. Code § 487(c) clearly defines a theft charge as it is defined as occurring "[w]hen the property is taken from the person of another." However, the dollar amount is not specified nor is any other guidance provided. In the current statute, section (a) set a dollar

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amount of over $950 for "money, labor, or real or personal property," and section (b) sets an amount of over $250 for farm goods. Ca. Pen. Code § 487(a) and (b). Washington theft statutes are divided into three degrees. Each of the various degrees of theft contain different limits on their use. Theft in the first and second degree are both felonies, carrying maximum prison sentences of ten and five years respectively. RCW 9A.56.030; RCW 9A.56.040; RCW 9A.20.021. However, these sentences are completely disproportionate with the maximum jail sentence that could be imposed in Mr. Saiti's California conviction. Only Theft in the third carries a sentence that matches the sentence that could have been imposed on Mr. Saiti; one year in jail. RCW 9A.56.050; RCW 9A.20.021.

At the sentencing hearing, defense counsel suggested the restitution fee of $200, indicated the amount did "not exceed $700 in the state of Washington" and that would make the relevant crime theft in the third. VRP at 357. Defense counsel also correctly pointed out "[w]e don't know how the crime was committed" and that Mr. Saiti "was sent to jail for a period of six months." VRP at 357 - 358. The State countered that the comparable Washington statute was Theft in the first degree, arguing that the Washington statute called for "property of any value, other than a firearm as defined in RC[W 9.]41.010 or a motor vehicle, taken from the person of another. So directly compared to the California statute, it

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appears to be the exact same." VRP at 353 - 354. This would be a powerful argument except the California statute is not the same. PC 487 does use the words "taken from the person of another," but everything else is different, including the penalty. The California statute functions differently and can be imposed in different ways than the Washington theft statutes, allowing it to be used to cover different scenarios at the discretion of the State and the Court, which is why it is called a "wobbler." See, People v. Sauceda, __ Cal.Rptr.3d __, 3 Cal.App.5th 635, 641 (Sept 23, 2016). It is clear that Ca. Pen. Code § 487 covers theft. It is clear that grand theft is sentenced as if it were a gross misdemeanor in Washington. However, its discretionary nature and the fact that we don't know how the crime was committed means that we do not know if the charges are comparable. Under such conditions that State has failed to show Mr. Saiti's out-of-state theft conviction is comparable to theft in the first degree. This means the closest analogous crime in Washington is theft in the third degree, because it carries the same penalty. Further, in such situations, the Rule of Lenity indicates that Mr. Saiti receive the benefit of the doubt and this conviction be treated as a gross misdemeanor, making his score for out-of-state convictions a four rather than a five.

Mr. Saiti's case should be remanded for resentencing, accordingly.

IV. When a legal object becomes drug paraphernalia only because

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of presence of a controlled substance, RCW 69.50.412 is necessarily concurrent with RCW 69.50.4013

Mr. Saiti was charged with and convicted of RCW 69.50.4013 Possession of Heroin and RCW 69.50.412 Unlawful Possession/Use of Drug Paraphernalia. Mr. Saiti was discovered to have a rubber container in his pocket, which had trace residue that was later determined to be heroin. VRP at 89. Mr. Saiti was also discovered to have two syringes, however, the State specifically declined to count these items as Drug Paraphernalia. VRP at 325. Thus, the State based its case solely on the rubber container.

RCW 69.50.4013 reads in pertinent part:

> (1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.
> (2) Except as provided in RCW 69.50.4014, any person who violates this section is guilty of a class C felony punishable under chapter 9A.20 RCW.

RCW 69.50.412(1)

> It is unlawful for any person to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance other than marijuana. Any person who violates this subsection is guilty of a misdemeanor.

RCW 69.50.102 provides a definition of drug paraphernalia similar to the description in RCW 69.50.412. RCW 69.50.102 also contains a list of

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items that are drug paraphernalia because they are "intended for use, or designed for use" in handling/use/storing a controlled substance.

In the current case, the rubber container is considered to be drug paraphernalia only because of the residue that was found inside the container. RCW 69.50.412(1). The container cannot be illegal without the drug. In other words, the convictions for the two charges are inseparable.

> Where a special statute punishes conduct which is punished under a general statute, the special statute applies and the accused can be charged only under that statute. *State v. Shriner*, 101 Wash.2d 576, 681 P.2d 237 (1984); *State v. Cann*, 92 Wash.2d 193, 197, 595 P.2d 912 (1979). The determining factor in deciding whether two statutes are concurrent is whether each violation of the special statute results in a violation of the general statute. *Shriner*, 101 Wash. at 580, 681 P.2d 237; *State v. Hupe*, 50 Wash.App. 277, 279-80, 748 P.2d 263, review denied, 110 Wash.2d 1019 (1988).

State v. Williams, 62 Wn.App. 748, 750, 815 P.2d 825 (Div. 1 1991). In *State v. Williams*, the defendant was discovered with a metal cocaine pipe with cocaine residue. *State v. Williams*, at 749 - 750. Williams argued "that every violation of the paraphernalia statute that results in controlled substance residue being left on paraphernalia necessarily amounts to a violation of both RCW 69.50.401(d) and RCW 69.50.412(1)." *State v. Williams*, at 752. The Court acknowledged that

> This could be true, we suppose, if all persons charged under the paraphernalia statute were also in possession of the paraphernalia they were suspected of using. However, the defendant need not be found in possession of drug paraphernalia in order to be charged under RCW 69.50.412(1).

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The court analyzed the relationship of RCW 69.50.412 and RCW 69.50.401 to determine that they were not concurrent because it is "possible, we believe, to violate RCW 69.50.412(1) without violating RCW 69.50.401(d)." *State v. Williams*, at 753. The court reasoned that because there were some situations where a defendant could be convicted of RCW 69.50.401 without possession of drug paraphernalia, and some situations where the inverse is true. *State v. Williams*, at 752 - 753. This is certainly true where the drug paraphernalia is, as in *Williams,* a type of drug paraphernalia that has no other purpose other than drug paraphernalia. Such drug paraphernalia is prohibited by its very nature and needs no connection to a controlled substance. However, this is not true in the current case. The rubber container is only illegal because of the residue that it contains. It does not violate RCW 69.50.412 unless it is used for one of the stated purposes. Without the heroin residue, the container is not "drug paraphernalia." The result is that a legal object that only becomes drug paraphernalia because of the existence of the drug in relation to the object cannot be separated from the possession of the prohibited substance. In such a case, the two charges become concurrent and requires the violation of both charges. "The statutes are concurrent in the sense that the general statute will be violated in each instance where the special

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statute has been violated" by the object that is only drug paraphernalia because of the existence of the drug. *State v. Shriner*, 101 Wn.2d 576, 681 P.2d 237, 240 (1984). This is different from the situation in *State v. Williams*, and when this happens, the defendant can only be charged under the special statute, not both. *State v. Shriner*, 101 Wash.2d 576, 681 P.2d 237 (1984); *State v. Cann*, 92 Wash.2d 193, 197, 595 P.2d 912 (1979). Therefore, the charges are concurrent and the court should dismiss the possession of a controlled substance charge.

CONCLUSION

The Court should find there is insufficient evidence to support the convictions for Theft of a Motor Vehicle and Unlawful Possession of a Firearm and reverse these convictions. The Court should find that the State failed to prove the comparability of the California grand theft statute and remand for resentencing. The Court should find that the trial court erred and violated Mr. Saiti's Constitutional rights when it prevented him from inquiring into Ms. Lopez's motivation in testifying and remand for a new trial.

DATED this 9th day of January, 2017.

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APPENDIX A

1. California Statutes

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Ca. Pen. Code § 664 Punishment for attempt to commit crime
CALIFORNIA CODES
CALIFORNIA PENAL CODE
Part 1. OF CRIMES AND PUNISHMENTS
Title 16. GENERAL PROVISIONS
Current through the 2016 Legislative Session
§ 664. Punishment for attempt to commit crime

Every person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration, shall be punished where no provision is made by law for the punishment of those attempts, as follows:

(a) If the crime attempted is punishable by imprisonment in the state prison, or by imprisonment pursuant to subdivision (h) of Section 1170, the person guilty of the attempt shall be punished by imprisonment in the state prison or in a county jail, respectively, for one-half the term of imprisonment prescribed upon a conviction of the offense attempted. However, if the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole. If the crime attempted is any other one in which the maximum sentence is life imprisonment or death, the person guilty of the attempt shall be punished by imprisonment in the state prison for five, seven, or nine years. The additional term provided in this section for attempted willful, deliberate, and premeditated murder shall not be imposed unless the fact that the attempted murder was willful, deliberate, and premeditated is charged in the accusatory pleading and admitted or found to be true by the trier of fact.

(b) If the crime attempted is punishable by imprisonment in a county jail, the person guilty of the attempt shall be punished by imprisonment in a county jail for a term not exceeding one-half the term of imprisonment prescribed upon a conviction of the offense attempted.

(c) If the offense so attempted is punishable by a fine, the offender convicted of that attempt shall be punished by a fine not exceeding one-half the largest fine which may be imposed upon a conviction of the offense attempted.

(d) If a crime is divided into degrees, an attempt to commit the crime may be of any of those degrees, and the punishment for the attempt

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shall be determined as provided by this section.

(e) Notwithstanding subdivision (a), if attempted murder is committed upon a peace officer or firefighter, as those terms are defined in paragraphs (7) and (9) of subdivision (a) of Section 190.2, a custodial officer, as that term is defined in subdivision (a) of Section 831 or subdivision (a) of Section 831.5, a custody assistant, as that term is defined in subdivision (a) of Section 831.7, or a nonsworn uniformed employee of a sheriff's department whose job entails the care or control of inmates in a detention facility, as defined in subdivision (c) of Section 289.6, and the person who commits the offense knows or reasonably should know that the victim is a peace officer, firefighter, custodial officer, custody assistant, or nonsworn uniformed employee of a sheriff's department engaged in the performance of his or her duties, the person guilty of the attempt shall be punished by imprisonment in the state prison for life with the possibility of parole. This subdivision shall apply if it is proven that a direct but ineffectual act was committed by one person toward killing another human being and the person committing the act harbored express malice aforethought, namely, a specific intent to unlawfully kill another human being. The Legislature finds and declares that this paragraph is declaratory of existing law.

(f) Notwithstanding subdivision (a), if the elements of subdivision (e) are proven in an attempted murder and it is also charged and admitted or found to be true by the trier of fact that the attempted murder was willful, deliberate, and premeditated, the person guilty of the attempt shall be punished by imprisonment in the state prison for 15 years to life. Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not apply to reduce this minimum term of 15 years in state prison, and the person shall not be released prior to serving 15 years' confinement.

Cite as Ca. Pen. Code § 664

History. Amended by **Stats 2011 ch 39 (AB 117), s 68**, eff. 6/30/2011.
Amended by **Stats 2011 ch 15 (AB 109), s 439**, eff. 4/4/2011, but operative no earlier than October 1, 2011, and only upon creation of a community corrections grant program to assist in implementing this act and upon an appropriation to fund the grant program.
Amended by **Stats 2006 ch 468 (SB 1184), s 1**, eff. 1/1/2007.
Amended by **Stats 2005 ch 52 (AB 999), s 1**, eff. 1/1/2006

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Ca. Pen. Code § 487 Grand theft

CALIFORNIA CODES

CALIFORNIA PENAL CODE

Part 1. OF CRIMES AND PUNISHMENTS

Title 13. OF CRIMES AGAINST PROPERTY

Chapter 5. LARCENY

Current through the 2016 Legislative Session

§ 487. Grand theft

Grand theft is theft committed in any of the following cases:

(a) When the money, labor, or real or personal property taken is of a value exceeding nine hundred fifty dollars ($950), except as provided in subdivision (b).

(b) Notwithstanding subdivision (a), grand theft is committed in any of the following cases:

(1) (A) When domestic fowls, avocados, olives, citrus or deciduous fruits, other fruits, vegetables, nuts, artichokes, or other farm crops are taken of a value exceeding two hundred fifty dollars ($250).

(B) For the purposes of establishing that the value of domestic fowls, avocados, olives, citrus or deciduous fruits, other fruits, vegetables, nuts, artichokes, or other farm crops under this paragraph exceeds two hundred fifty dollars ($250), that value may be shown by the presentation of credible evidence which establishes that on the day of the theft domestic fowls, avocados, olives, citrus or deciduous fruits, other fruits, vegetables, nuts, artichokes, or other farm crops of the same variety and weight exceeded two hundred fifty dollars ($250) in wholesale value.

(2) When fish, shellfish, mollusks, crustaceans, kelp, algae, or other aquacultural products are taken from a commercial or research operation which is producing that product, of a value exceeding two hundred fifty dollars ($250).

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(3) Where the money, labor, or real or personal property is taken by a servant, agent, or employee from his or her principal or employer and aggregates nine hundred fifty dollars ($950) or more in any 12 consecutive month period.

(c) When the property is taken from the person of another.

(d) When the property taken is any of the following:

(1) An automobile.

(2) A firearm.

Cite as Ca. Pen. Code § 487
History. Amended by **Stats 2013 ch 618 (AB 924), s 7**, eff. 1/1/2014.
Amended by **Stats 2010 ch 694 (SB 1338), s 1.5**, eff. 1/1/2011.
Amended by **Stats 2010 ch 693 (AB 2372), s 1**, eff. 1/1/2011.
Amended by **Stats 2009 ch 28 (SB X3-18), s 17**, eff. 1/1/2010.
Amended by **Stats 2002 ch 787 (SB 1798), s 12**, eff. 1/1/2003

Ca. Pen. Code § 488
Grand theft is punishable as follows:
(a) When the grand theft involves the theft of a firearm, by imprisonment in the state prison for 16 months, two, or three years.
(b) In all other cases, by imprisonment in a county jail not exceeding one year or pursuant to subdivision (h) of Section 1170.

Ca. Pen. Code § 1170
CALIFORNIA CODES
CALIFORNIA PENAL CODE
Part 2. OF CRIMINAL PROCEDURE
Title 7. OF PROCEEDINGS AFTER THE COMMENCEMENT OF THE TRIAL AND BEFORE JUDGMENT
Chapter 4.5. TRIAL COURT SENTENCING
Article 1. Initial Sentencing
Current through the 2016 Legislative Session
§ 1170. *[Effective 1/1/2017]* Legislative findings and declarations; sentence choice; recall

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(a)

(1) The Legislature finds and declares that the purpose of sentencing is public safety achieved through punishment, rehabilitation, and restorative justice. When a sentence includes incarceration, this purpose is best served by terms that are proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances.

(2) The Legislature further finds and declares that programs should be available for inmates, including, but not limited to, educational, rehabilitative, and restorative justice programs that are designed to promote behavior change and to prepare all eligible offenders for successful reentry into the community. The Legislature encourages the development of policies and programs designed to educate and rehabilitate all eligible offenders. In implementing this section, the Department of Corrections and Rehabilitation is encouraged to allow all eligible inmates the opportunity to enroll in programs that promote successful return to the community. The Department of Corrections and Rehabilitation is directed to establish a mission statement consistent with these principles.

(3) In any case in which the sentence prescribed by statute for a person convicted of a public offense is a term of imprisonment in the state prison, or a term pursuant to subdivision (h), of any specification of three time periods, the court shall sentence the defendant to one of the terms of imprisonment specified unless the convicted person is given any other disposition provided by law, including a fine, jail, probation, or the suspension of imposition or execution of sentence or is sentenced pursuant to subdivision (b) of Section 1168 because he or she had committed his or her crime prior to July 1, 1977. In sentencing the convicted person, the court shall apply the sentencing rules of the Judicial Council. The court, unless it determines that there are circumstances in mitigation of the sentence prescribed, shall also impose any other term that it is required by law to impose as an additional term. Nothing in this article shall affect any provision of law that imposes the death penalty, that authorizes or restricts the granting of probation or suspending the execution or imposition of sentence, or

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expressly provides for imprisonment in the state prison for life, except as provided in paragraph (2) of subdivision (d). In any case in which the amount of preimprisonment credit under Section 2900.5 or any other provision of law is equal to or exceeds any sentence imposed pursuant to this chapter, except for a remaining portion of mandatory supervision imposed pursuant to subparagraph (B) of paragraph (5) of subdivision (h), the entire sentence shall be deemed to have been served, except for the remaining period of mandatory supervision, and the defendant shall not be actually delivered to the custody of the secretary or the county correctional administrator. The court shall advise the defendant that he or she shall serve an applicable period of parole, postrelease community supervision, or mandatory supervision and order the defendant to report to the parole or probation office closest to the defendant's last legal residence, unless the in-custody credits equal the total sentence, including both confinement time and the period of parole, postrelease community supervision, or mandatory supervision. The sentence shall be deemed a separate prior prison term or a sentence of imprisonment in a county jail under subdivision (h) for purposes of Section 667.5, and a copy of the judgment and other necessary documentation shall be forwarded to the secretary.

(b) When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. At least four days prior to the time set for imposition of judgment, either party or the victim, or the family of the victim if the victim is deceased, may submit a statement in aggravation or mitigation to dispute facts in the record or the probation officer's report, or to present additional facts. In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports, including reports received pursuant to Section 1203.03, and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons for imposing the upper or

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lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. A term of imprisonment shall not be specified if imposition of sentence is suspended.

(c) The court shall state the reasons for its sentence choice on the record at the time of sentencing. The court shall also inform the defendant that as part of the sentence after expiration of the term he or she may be on parole for a period as provided in Section 3000 or 3000.08 or postrelease community supervision for a period as provided in Section 3451.

(d) (1) When a defendant subject to this section or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison or county jail pursuant to subdivision (h) and has been committed to the custody of the secretary or the county correctional administrator, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings in the case of state prison inmates, or the county correctional administrator in the case of county jail inmates, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The court resentencing under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. Credit shall be given for time served.

(2) (A) (i) When a defendant who was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has been incarcerated for at least 15 years, the defendant may submit to the sentencing court a petition for recall and resentencing.

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(ii) Notwithstanding clause (i), this paragraph shall not apply to defendants sentenced to life without parole for an offense where it was pled and proved that the defendant tortured, as described in Section 206, his or her victim or the victim was a public safety official, including any law enforcement personnel mentioned in Chapter 4.5 (commencing with Section 830) of Title 3, or any firefighter as described in Section 245.1, as well as any other officer in any segment of law enforcement who is employed by the federal government, the state, or any of its political subdivisions.

(B) The defendant shall file the original petition with the sentencing court. A copy of the petition shall be served on the agency that prosecuted the case. The petition shall include the defendant's statement that he or she was under 18 years of age at the time of the crime and was sentenced to life in prison without the possibility of parole, the defendant's statement describing his or her remorse and work towards rehabilitation, and the defendant's statement that one of the following is true:

(i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.

(ii) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the sentence is being considered for recall.

(iii) The defendant committed the offense with at least one adult codefendant.

(iv) The defendant has performed acts that tend to

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indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse.

(C) If any of the information required in subparagraph (B) is missing from the petition, or if proof of service on the prosecuting agency is not provided, the court shall return the petition to the defendant and advise the defendant that the matter cannot be considered without the missing information.

(D) A reply to the petition, if any, shall be filed with the court within 60 days of the date on which the prosecuting agency was served with the petition, unless a continuance is granted for good cause.

(E) If the court finds by a preponderance of the evidence that one or more of the statements specified in clauses (i) to (iv), inclusive, of subparagraph (B) is true, the court shall recall the sentence and commitment previously ordered and hold a hearing to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. Victims, or victim family members if the victim is deceased, shall retain the rights to participate in the hearing.

(F) The factors that the court may consider when determining whether to resentence the defendant to a term of imprisonment with the possibility of parole include, but are not limited to, the following:

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(i) The defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law.

(ii) The defendant does not have juvenile felony adjudications for assault or other felony crimes with a significant potential for personal harm to victims prior to the offense for which the defendant was sentenced to life without the possibility of parole.

(iii) The defendant committed the offense with at least one adult codefendant.

(iv) Prior to the offense for which the defendant was sentenced to life without the possibility of parole, the defendant had insufficient adult support or supervision and had suffered from psychological or physical trauma, or significant stress.

(v) The defendant suffers from cognitive limitations due to mental illness, developmental disabilities, or other factors that did not constitute a defense, but influenced the defendant's involvement in the offense.

(vi) The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs, if those programs have been available at his or her classification level and facility, using self-study for self-improvement, or showing evidence of remorse.

(vii) The defendant has maintained family ties or connections with others through letter writing,

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calls, or visits, or has eliminated contact with individuals outside of prison who are currently involved with crime.

(viii) The defendant has had no disciplinary actions for violent activities in the last five years in which the defendant was determined to be the aggressor.

(G) The court shall have the discretion to resentence the defendant in the same manner as if the defendant had not previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence. The discretion of the court shall be exercised in consideration of the criteria in subparagraph (F). Victims, or victim family members if the victim is deceased, shall be notified of the resentencing hearing and shall retain their rights to participate in the hearing.

(H) If the sentence is not recalled or the defendant is resentenced to imprisonment for life without the possibility of parole, the defendant may submit another petition for recall and resentencing to the sentencing court when the defendant has been committed to the custody of the department for at least 20 years. If the sentence is not recalled or the defendant is resentenced to imprisonment for life without the possibility of parole under that petition, the defendant may file another petition after having served 24 years. The final petition may be submitted, and the response to that petition shall be determined, during the 25th year of the defendant's sentence.

(I) In addition to the criteria in subparagraph (F), the court may consider any other criteria that the court deems relevant to its decision, so long as the court identifies them on the record, provides a statement of reasons for

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adopting them, and states why the defendant does or does not satisfy the criteria.

(J) This subdivision shall have retroactive application.

(K) Nothing in this paragraph is intended to diminish or abrogate any rights or remedies otherwise available to the defendant.

(e) (1) Notwithstanding any other law and consistent with paragraph (1) of subdivision (a), if the secretary or the Board of Parole Hearings or both determine that a prisoner satisfies the criteria set forth in paragraph (2), the secretary or the board may recommend to the court that the prisoner's sentence be recalled.

(2) The court shall have the discretion to resentence or recall if the court finds that the facts described in subparagraphs (A) and (B) or subparagraphs (B) and (C) exist:

(A) The prisoner is terminally ill with an incurable condition caused by an illness or disease that would produce death within six months, as determined by a physician employed by the department.

(B) The conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety.

(C) The prisoner is permanently medically incapacitated with a medical condition that renders him or her permanently unable to perform activities of basic daily living, and results in the prisoner requiring 24-hour total care, including, but not limited to, coma, persistent vegetative state, brain death, ventilator-dependency, loss of control of muscular or neurological function, and that incapacitation did not exist at the time of the original sentencing.
The Board of Parole Hearings shall make findings

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pursuant to this subdivision before making a recommendation for resentence or recall to the court. This subdivision does not apply to a prisoner sentenced to death or a term of life without the possibility of parole.

(3) Within 10 days of receipt of a positive recommendation by the secretary or the board, the court shall hold a hearing to consider whether the prisoner's sentence should be recalled.

(4) Any physician employed by the department who determines that a prisoner has six months or less to live shall notify the chief medical officer of the prognosis. If the chief medical officer concurs with the prognosis, he or she shall notify the warden. Within 48 hours of receiving notification, the warden or the warden's representative shall notify the prisoner of the recall and resentencing procedures, and shall arrange for the prisoner to designate a family member or other outside agent to be notified as to the prisoner's medical condition and prognosis, and as to the recall and resentencing procedures. If the inmate is deemed mentally unfit, the warden or the warden's representative shall contact the inmate's emergency contact and provide the information described in paragraph (2).

(5) The warden or the warden's representative shall provide the prisoner and his or her family member, agent, or emergency contact, as described in paragraph (4), updated information throughout the recall and resentencing process with regard to the prisoner's medical condition and the status of the prisoner's recall and resentencing proceedings.

(6) Notwithstanding any other provisions of this section, the prisoner or his or her family member or designee may independently request consideration for recall and resentencing by contacting the chief medical officer at the prison or the secretary. Upon receipt of the request, the chief medical officer and the warden or the warden's representative shall follow the procedures described in paragraph (4). If the

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secretary determines that the prisoner satisfies the criteria set forth in paragraph (2), the secretary or board may recommend to the court that the prisoner's sentence be recalled. The secretary shall submit a recommendation for release within 30 days in the case of inmates sentenced to determinate terms and, in the case of inmates sentenced to indeterminate terms, the secretary shall make a recommendation to the Board of Parole Hearings with respect to the inmates who have applied under this section. The board shall consider this information and make an independent judgment pursuant to paragraph (2) and make findings related thereto before rejecting the request or making a recommendation to the court. This action shall be taken at the next lawfully noticed board meeting.

(7) Any recommendation for recall submitted to the court by the secretary or the Board of Parole Hearings shall include one or more medical evaluations, a postrelease plan, and findings pursuant to paragraph (2).

(8) If possible, the matter shall be heard before the same judge of the court who sentenced the prisoner.

(9) If the court grants the recall and resentencing application, the prisoner shall be released by the department within 48 hours of receipt of the court's order, unless a longer time period is agreed to by the inmate. At the time of release, the warden or the warden's representative shall ensure that the prisoner has each of the following in his or her possession: a discharge medical summary, full medical records, state identification, parole or postrelease community supervision medications, and all property belonging to the prisoner. After discharge, any additional records shall be sent to the prisoner's forwarding address.

(10) The secretary shall issue a directive to medical and correctional staff employed by the department that details the guidelines and procedures for initiating a recall and resentencing procedure. The directive shall clearly state that any prisoner who is given a prognosis of six months or less to live is eligible for recall and resentencing consideration, and

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that recall and resentencing procedures shall be initiated upon that prognosis.

(11) The provisions of this subdivision shall be available to an inmate who is sentenced to a county jail pursuant to subdivision (h). For purposes of those inmates, "secretary" or "warden" shall mean the county correctional administrator and "chief medical officer" shall mean a physician designated by the county correctional administrator for this purpose.

(f) Notwithstanding any other provision of this section, for purposes of paragraph (3) of subdivision (h), any allegation that a defendant is eligible for state prison due to a prior or current conviction, sentence enhancement, or because he or she is required to register as a sex offender shall not be subject to dismissal pursuant to Section 1385.

(g) A sentence to state prison for a determinate term for which only one term is specified, is a sentence to state prison under this section.

(h) (1) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision where the term is not specified in the underlying offense shall be punishable by a term of imprisonment in a county jail for 16 months, or two or three years.

(2) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision shall be punishable by imprisonment in a county jail for the term described in the underlying offense.

(3) Notwithstanding paragraphs (1) and (2), where the defendant (A) has a prior or current felony conviction for a serious felony described in subdivision (c) of Section 1192.7 or a prior or current conviction for a violent felony described in subdivision (c) of Section 667.5, (B) has a prior felony conviction in another jurisdiction for an offense that has all the elements of a serious felony described in subdivision (c) of Section 1192.7 or a violent felony described in subdivision (c) of Section 667.5, (C) is required to register as a sex offender

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pursuant to Chapter 5.5 (commencing with Section 290) of Title 9 of Part 1, or (D) is convicted of a crime and as part of the sentence an enhancement pursuant to Section 186.11 is imposed, an executed sentence for a felony punishable pursuant to this subdivision shall be served in state prison.

(4) Nothing in this subdivision shall be construed to prevent other dispositions authorized by law, including pretrial diversion, deferred entry of judgment, or an order granting probation pursuant to Section 1203.1.

(5) (A) Unless the court finds, in the interest of justice, that it is not appropriate in a particular case, the court, when imposing a sentence pursuant to paragraph (1) or (2), shall suspend execution of a concluding portion of the term for a period selected at the court's discretion.

(B) The portion of a defendant's sentenced term that is suspended pursuant to this paragraph shall be known as mandatory supervision, and, unless otherwise ordered by the court, shall commence upon release from physical custody or an alternative custody program, whichever is later. During the period of mandatory supervision, the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation, for the remaining unserved portion of the sentence imposed by the court. The period of supervision shall be mandatory, and may not be earlier terminated except by court order. Any proceeding to revoke or modify mandatory supervision under this subparagraph shall be conducted pursuant to either subdivisions (a) and (b) of Section 1203.2 or Section 1203.3. During the period when the defendant is under that supervision, unless in actual custody related to the sentence imposed by the court, the defendant shall be entitled to only actual time credit against the term of imprisonment imposed by the court. Any time period

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which is suspended because a person has absconded shall not be credited toward the period of supervision.

(6) The sentencing changes made by the act that added this subdivision shall be applied prospectively to any person sentenced on or after October 1, 2011.

(7) The sentencing changes made to paragraph (5) by the act that added this paragraph shall become effective and operative on January 1, 2015, and shall be applied prospectively to any person sentenced on or after January 1, 2015.

(i) This section shall become operative on January 1, 2022.

Cite as Ca. Pen. Code § 1170

History. Amended by **Stats 2016 ch 887 (SB 1016), s 6.3**, eff. 1/1/2017.
Amended by **Stats 2016 ch 867 (SB 1084), s 2.1**, eff. 1/1/2017.
Amended by **Stats 2016 ch 696 (AB 2590), s 1**, eff. 1/1/2017.
Amended by **Stats 2015 ch 378 (AB 1156), s 2**, eff. 1/1/2016.
Amended by **Stats 2014 ch 612 (AB 2499), s 2**, eff. 1/1/2015.
Amended by **Stats 2014 ch 26 (AB 1468), s 17**, eff. 6/20/2014.
Amended by **Stats 2013 ch 508 (SB 463), s 6**, eff. 1/1/2014.
Amended by **Stats 2013 ch 76 (AB 383), s 152**, eff. 1/1/2014.
Amended by **Stats 2013 ch 32 (SB 76), s 6**, eff. 6/27/2013.
Amended by **Stats 2012 ch 828 (SB 9), s 2**, eff. 1/1/2013.
Amended by **Stats 2012 ch 43 (SB 1023), s 28**, eff. 6/27/2012.
Amended by **Stats 2011 ch 361 (SB 576), s 7.7**, eff. 9/29/2011.
Amended by **Stats 2011 ch 12 (AB X1-17), s 12.4**, eff. 9/20/2011, op. 10/1/2011.
Amended by **Stats 2011 ch 136 (AB 116), s 4**, eff. 7/27/2011.
Amended by **Stats 2011 ch 39 (AB 117), s 68**, eff. 6/30/2011.
Amended by **Stats 2011 ch 39 (AB 117), s 28**, eff. 6/30/2011.
Amended by **Stats 2011 ch 15 (AB 109), s 451**, eff. 4/4/2011, but operative no earlier than October 1, 2011, and only upon creation of a community corrections grant program to assist in implementing this act and upon an appropriation to fund the grant program.
Amended by **Stats 2010 ch 256 (AB 2263), s 6**, eff. 1/1/2011.
Amended by **Stats 2010 ch 328 (SB 1330), s 162**, eff. 1/1/2011.

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Amended by **Stats 2008 ch 416 (SB 1701), s 2**, eff. 1/1/2009.
Amended by **Stats 2007 ch 740 (AB 1539), s 2**, eff. 1/1/2008.
Amended by **Stats 2007 ch 3 (SB 40), s 3**, eff. 3/30/2007.
Amended by **Stats 2007 ch 3 (SB 40), s 2**, eff. 3/30/2007.
Amended by **Stats 2004 ch 747 (AB 854), s 1**, eff. 1/1/2005.

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Ca. Pen. Code § 17 Felony; misdemeanor; infraction

CALIFORNIA CODES

CALIFORNIA PENAL CODE

PRELIMINARY PROVISIONS

Current through the 2016 Legislative Session

§ 17. Felony; misdemeanor; infraction

(a) A felony is a crime that is punishable with death, by imprisonment in the state prison, or notwithstanding any other provision of law, by imprisonment in a county jail under the provisions of subdivision (h) of Section 1170. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.

(b) When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

(1) After a judgment imposing a punishment other than imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170.

(2) When the court, upon committing the defendant to the Division of Juvenile Justice, designates the offense to be a misdemeanor.

(3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.

(4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his or her arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint.

(5) When, at or before the preliminary examination or prior to filing an order pursuant to Section 872, the magistrate

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determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint.

(c) When a defendant is committed to the Division of Juvenile Justice for a crime punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail not exceeding one year, the offense shall, upon the discharge of the defendant from the Division of Juvenile Justice, thereafter be deemed a misdemeanor for all purposes.

(d) A violation of any code section listed in Section 19.8 is an infraction subject to the procedures described in Sections 19.6 and 19.7 when:

(1) The prosecutor files a complaint charging the offense as an infraction unless the defendant, at the time he or she is arraigned, after being informed of his or her rights, elects to have the case proceed as a misdemeanor, or;

(2) The court, with the consent of the defendant, determines that the offense is an infraction in which event the case shall proceed as if the defendant had been arraigned on an infraction complaint.

(e) Nothing in this section authorizes a judge to relieve a defendant of the duty to register as a sex offender pursuant to Section 290 if the defendant is charged with an offense for which registration as a sex offender is required pursuant to Section 290, and for which the trier of fact has found the defendant guilty.

Cite as Ca. Pen. Code § 17

History. Amended by **Stats 2011 ch 12 (AB X1-17), s 6**, eff. 9/20/2011, op. 10/1/2011.

Amended by **Stats 2011 ch 39 (AB 117), s 68**, eff. 6/30/2011.

Amended by **Stats 2011 ch 15 (AB 109), s 228**, eff. 4/4/2011, but operative no earlier than October 1, 2011, and only upon creation of a community corrections grant program to assist in implementing this act and upon an appropriation to fund the grant program.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION II

STATE OF WASHINGTON Plaintiff/Respondent, vs. LENDIN SAITI, Defendant/Appellant.	**Case No. 49178-8-II** Superior Court No. 15-1-00228-5 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that a true and correct copy of the **APPELLANT'S BRIEF** in the above entitled case was sent, via

Emailed to:

Mark D McClain
Pacific County Prosecutor's Office
PO Box 45
South Bend, WA 98586-0045
mmcclain@co.pacific.wa.us
(360) 875-9361 EXT 8

U.S.P.S. First Class mail to:

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Lendin Saiti (DoC # 392126)
Washington State Penitentiary
1313 N 13th Ave.
Walla Walla, WA 99362

DATED this 9th day of January, 2017.

Eugene C. Austin, WSBA # 31129

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